Ab Aziz Al-Safi bin Ismail & Anor v Noraini bt Abdullah (trading in the name and style of Maharani Apartment Hotel & Spa)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02–2039–12 OF 2014
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
6 APRIL 2016

Contract — Termination — Notice of termination — Landlord and appellants entered into tenancy agreement — Appellants and respondent entered into memorandum of understanding and 'Perjanjian Persefahaman' in relation to tenancy agreement — Respondent failed to pay all outstanding rentals and utility — Landlord terminated tenancy agreement — Appellants issued notice of termination of respondent as manager — Whether termination notices valid and enforceable

This was the appellant's appeal against the decision of the learned judge in allowing the claim of the respondent for unlawful termination with damages to be assessed before the learned deputy registrar. The appellant entered into a tenancy agreement with the landlord for 12 units of apartment for a term of ten years with the agreed rental of RM7,200 per month. On 2 July 2008, Aman Mesra Apartment represented by the first appellant entered into a memorandum of understanding ('the MOU') with Maharani Apartment Hotel & Spa which was represented by the respondent. Under the MOU, Maharani Apartment Hotel & Spa was to provide management and marketing services in relation to the said apartments. An agreement known as 'Perjanjian Persefahaman' was signed between the appellants and the respondent whereby under the agreement, the respondent, was appointed as manager for the said apartments and that she was to provide the facilities and equipment required. On 16 August 2009, the first appellant discovered that extensive renovations had been carried out to the said apartments by the respondent. The respondent was asked to desist but failed to do so. On 7 September 2009, both parties signed a 'Deklarasi Bayaran Sewa Bulanan' ('declaration'). Under the declaration, the respondent undertook to pay all outstanding rentals and utility bills and to have no outstanding bills. The respondent also was prohibited from making any additional renovations to the said apartments and that the respondent was to demolish all renovations and restore the affected areas to their 'original state'. Again, the respondent failed to comply with the declaration. On 26 May 2010, the appellants' solicitors informed the respondent that the landlord terminated the tenancy agreement and the appellant had been issued notice to vacate failing which landlord would initiate

distress proceedings. Consequently, the respondent was required to vacate and surrender the keys to the said apartments before 1 June 2010 failing which the respondent would have to bear any loss suffered. The respondent did not vacate the said apartments. Through a letter dated 2 March 2011, the respondent's appointment as manager was terminated and the 'Perjanjian Persefahaman' was revoked. The respondent was required to return the keys and the appellant also demanded settlement of all arrears amounting to RM109,971.40. But still, the respondent failed to pay the outstanding amount neither did she vacate the said apartments. On 12 May 2011, the apartments were repossessed by the landlord and a public auction was conducted under the distress proceedings in relation to items seized. The respondent sued the appellants seeking declaratory orders that the termination notices dated 26 May 2010 and 2 March 2011 were invalid and unenforceable. The respondent also sued for loss and damage relating to the distress proceedings and for loss of reputation. The claim was denied and the appellants counterclaimed for their own losses. The High Court allowed the respondent's claim with damages to be assessed by the deputy registrar while the appellant's counterclaim was dismissed, hence this appeal.

Held, allowing the appeal with costs of RM30,000 here and below:

(1) As the respondent was the manager of the said apartments which were tenanted to the appellants, not only was it right but it was necessary that the appellants notify the respondent of the termination of tenancy and requirement to deliver vacant possession of the said apartments back to the landlord by 1 June 2010. The object of the letter of 26 May 2010 was to convey the landlord's notice of termination of tenancy and notice to vacate, hence, the letter could not be invalid or even improper. The declaratory order granted in relation to this letter was plainly erroneous and misplaced (see paras 27 & 30).

(2) The MOU, 'Perjanjian Persefahaman' and 'Deklarasi' must be read together to discern the intention of the parties and the terms as agreed between them. Based on these agreements, the terms of the respondent's appointment as manager was no longer resided in the 'Perjanjian Persefahaman' alone or even the earlier MOU, but in the 'Deklarasi' as well. On a totality of the evidence, both undisputed and admitted, it was clear that the respondent failed to attend to the matters that were agreed under both agreements, the 'Perjanjian Persefahaman' and the 'Deklarasi'. It was the respondent's own failure to keep up to her end of the obligations which ultimately led to the distress proceedings being brought by the landlord (see paras 33 & 36–37).

(3) When rentals are not paid, the tenant, including one such as the respondent who had agreed to pay the rentals, must vacate the apartments when tenancy agreement is terminated. A writ of distress is lawfully and properly issued when tenant fails to settle rentals and vacate

premises. The respondent certainly did not pay the rentals which eventually led to the distress proceedings by the landlord. Given that the respondent was the architect of her own loss, the respondent's claim was unsustainable in law from inception. The appellants were within their contractual right to terminate for breach with all those identified defaults on the respondent's part and consequently, the notice of termination was valid and proper (see paras 39–40).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap keputusan hakim yang bijaksana dalam membenarkan tuntutan responden untuk penamatan menyalahi undang-undang dengan ganti rugi yang akan dinilai di hadapan timbalan pendaftar yang bijaksana. Perayu memasuki perjanjian penyewaan dengan tuan tanah untuk 12 unit pangsapuri untuk tempoh sepuluh tahun dengan sewa yang dipersetujui sebanyak RM7,200 sebulan. Pada 2 Julai 2008, Aman Mesra Apartment diwakili oleh perayu pertama telah memasuki memorandum persefahaman ('MP') dengan Maharani Apartment Hotel & Spa yang diwakili oleh responden. Di bawah MP tersebut, Maharani Apartment Hotel & Spa adalah untuk memberi perkhidmatan pengurusan dan pemasaran berhubung dengan pangsapuri tersebut. Satu perjanjian yang dikenali sebagai 'Perjanjian Persefahaman' telah ditandatangani antara perayu dan responden di mana di bawah perjanjian tersebut, responden dilantik sebagai pengurus untuk pangsapuri tersebut dan bahawa dia perlu menyediakan kemudahan dan peralatan yang diperlukan. Pada 16 Ogos 2009, perayu pertama mendapati bahawa pengubahsuaian keseluruhan telah dijalankan di pangsapuri tersebut oleh responden. Responden telah diminta untuk berhenti tetapi gagal berbuat demikian. Pada 7 September 2009, kedua-dua pihak menandatangani 'Deklarasi Bayaran Sewa Bulanan' ('deklarasi'). Di bawah deklarasi, responden bersetuju untuk membayar semua sewa tertunggak dan bil-bil utiliti dan tidak mempunyai bil tertunggak. Responden juga dilarang daripada membuat sebarang pengubahsuaian tambahan untuk pangsapuri tersebut dan bahawa responden perlu merobohkan semua pengubahsuaian dan membaikpulih kawasan yang terjejas kepada 'keadaan asalnya'. Sekali lagi, responden gagal mematuhi deklarasi. Pada 26 Mei 2010, peguam cara perayu memberitahu responden bahawa tuan tanah menamatkan perjanjian penyewaan dan perayu telah diberikan notis untuk mengosongkan jika tidak, tuan tanah akan memulakan prosiding distres. Sehubungan dengan itu, responden diperlukan untuk mengosongkan dan menyerahkan kunci kepada pangsapuri tersebut sebelum 1 Jun 2010 di mana jika gagal, responden perlu menanggung apa-apa kerugian yang ditanggung. Responden tidak mengosongkan pangsapuri tersebut. Melalui surat bertarikh 2 Mac 2011, pelantikan responden sebagai pengurus ditamatkan dan Perjanjian Persefahaman telah dibatalkan. Responden dikehendaki memulangkan kunci dan perayu juga menuntut penyelesaian semua tunggakan berjumlah RM109,971.40. Namun begitu, responden gagal membayar jumlah yang tertunggak mahupun mengosongkan

pangsapuri tersebut. Pada 12 Mei 2011, pangsapuri tersebut telah ditarik balik oleh tuan tanah dan lelongan awam telah dijalankan di bawah prosiding distres berhubung barangan yang disita. Responden menyaman perayu untuk mendapatkan perintah pengisytiharan bahawa notis penamatan bertarikh 26 Mei 2010 dan 2 Mac 2011 adalah tidak sah dan tidak boleh dikuatkuasakan. Responden juga mendakwa untuk kerugian dan kerosakan berhubung dengan prosiding distres dan kehilangan reputasi. Dakwaan tersebut ditolak dan perayu membuat tuntutan balas untuk kerugian mereka sendiri. Mahkamah Tinggi membenarkan tuntutan responden dengan ganti rugi yang akan dinilai oleh timbalan pendaftar sementara tuntutan balas perayu ditolak, oleh itu rayuan ini dibuat.

Diputuskan, membenarkan rayuan dengan kos RM30,000 di sini dan di bawah:

(1) Memandangkan responden adalah pengurus kepada pangsapuri yang disewakan kepada perayu, bukan sahaja betul tetapi perlu untuk perayu memaklumkan kepada responden penamatan penyewaan dan keperluan untuk menyerahkan milikan kosong pangsapuri itu kembali kepada tuan tanah pada 1 Jun 2010. Tujuan surat bertarikh 26 Mei 2010 adalah untuk menyampaikan notis tuan tanah berhubung penamatan penyewaan dan notis pengosongan, oleh itu, surat tersebut tidak boleh menjadi tidak sah atau tidak wajar. Perintah pengisytiharan diberikan berhubung dengan surat ini adalah jelas salah dan tidak kena pada tempatnya (lihat perenggan 27 & 30).

(2) MP, perjanjian persefahaman dan deklarasi hendaklah dibaca bersama untuk membezakan niat pihak-pihak dan syarat-syarat yang dipersetujui antara mereka. Berdasarkan perjanjian-perjanjian ini, syarat-syarat pelantikan responden sebagai pengurus tidak lagi berdasarkan perjanjian persefahaman itu sendiri atau MP terdahulu, tetapi dalam deklarasi juga. Berdasarkan keseluruhan keterangan, kedua-duanya tidak dipertikaikan dan diakui, adalah jelas bahawa responden gagal untuk mengendalikan perkara-perkara yang telah dipersetujui di bawah kedua-dua perjanjian, perjanjian persefahaman dan deklarasi. Kegagalan responden sendiri untuk melaksanakan kewajipannya yang akhirnya membawa kepada prosiding distres yang dikemukakan oleh tuan tanah (lihat perenggan 33 & 36–37).

(3) Apabila sewa tidak dibayar, penyewa, termasuk seseorang seperti responden yang telah bersetuju untuk membayar sewa, mesti mengosongkan pangsapuri apabila perjanjian penyewaan ditamatkan. Satu writ distres sah dan dikeluarkan sewajarnya apabila penyewa gagal menjelaskan sewa dan mengosongkan premis. Responden sudah pasti tidak membayar sewa yang akhirnya membawa kepada prosiding distres oleh tuan tanah. Memandangkan bahawa responden adalah orang yang

A menyebabkan kehilangannya sendiri, tuntutan responden tidak boleh dikekalkan dari segi undang-undang daripada awal. Adalah dalam hak kontraktual perayu untuk menamatkan disebabkan pelanggaran dengan semua orang ingkar yang dikenal pasti bagi pihak responden dan akibatnya, notis penamatan adalah sah dan wajar (lihat perenggan B 39–40).]

Notes

For cases on notice of termination, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 7067–7071.

C

Appeal from: Civil Suit No 22–74 of 2011 (High Court, Kota Bahru)

Shukri Hj Mohamad (Sukri with him) (Wan Haron Sukri & Nordin) for the first appellant.

D *Malik Imtiaz Sarwar (Pavendeep Singh with him) (Shukor Baljit & Partners) for the second appellant.*

Mohd Syukran Mohd Norrahim (Mohd Firdaus Che Soh with him) (Syukran Noordin) for the respondent.

E **Mary Lim JCA (delivering judgment of the court):**

[1] This is an appeal against the decision of the learned High Court judge who had allowed the claim of the respondent for unlawful termination with damages to be assessed before the learned deputy registrar. Upon due F consideration of the written and oral submissions of all learned counsel and the record of appeal, we unanimously allowed the appeal with costs giving our reasons in brief. These are our full grounds.

BACKGROUND FACTS

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[2] On 5 March 2008, the appellants entered into a tenancy agreement with DYMM Tengku Anis bt Tengku Abdul Hamid ('landlord') wherein the landlord agreed to let and the appellants accepted tenancy of 12 units of apartments located within a three-storey building erected on Lots 627 & 628, H Mukim Kenali, Daerah Kubang Kerian, Seksyen 54, Jajahan Kota Bahru, Kelantan held under title No HS(D) 458 and HS(D) 450 ('the said apartments'). The tenancy was for a term of ten years commencing from 1 February 2008 and ending on 31 January 2018. The rental was agreed at RM7,200 per month. This agreement shall be referred to as the 'tenancy I agreement'.

[3] Aman Mesra Apartment is a company which provides accommodation facilities to students and individuals on a long term basis. Maharani Apartment Hotel & Spa, on the other hand, is a management and marketing company

which provides accommodation and hotel services through memberships and groups. On 2 July 2008, these two companies signed a memorandum of understanding ('MOU'). Aman Mesra Apartment was represented by the first appellant while Maharani Apartment Hotel & Spa was represented by the respondent. Under the MOU, Maharani Apartment Hotel & Spa was appointed by Aman Mesra Apartment to provide management and marketing services in relation to the said apartments.

[4] The salient terms of the MOU are as follow:

(a) the appellants will provide the facilities and equipment according to appropriate specifications for long-term accommodation facilities for guests;

(b) the respondent was appointed as manager in respect of the overall management and marketing for the said apartments;

(c) the appellants agreed to fully delegate the management of the operation of the said apartments to the respondent;

(d) the respondent agreed to manage and market the said apartments with a commitment of 50% accommodation rate at all times;

(e) the respondent agreed to bear the managements costs; and

(f) both parties are entitled to terminate the MOU by giving to the other at least three months written notice.

[5] A few days later, on 9 July 2008, another agreement known as 'Perjanjian Persefahaman' was signed, this time between the appellants and the respondent. Under this agreement, the respondent, the individual, was appointed as manager for the said apartments and that she is to provide the facilities and equipment required. The appellants agreed to assist the respondent on the provision of facilities and equipment. This agreement was for a ten year period, as long as the tenancy agreement. It was also agreed that the respondent would receive 40% of the total profits after deducting tax as remuneration for such services rendered. A copy of the tenancy agreement was attached to this 'Perjanjian Persefahaman'.

[6] On 16 August 2009, the first appellant visited the said apartments. He discovered that extensive works and renovations had been carried out to the said apartments without either his prior consent or the approval of the local authority. The respondent was asked to desist. When the respondent failed to do so, the first appellant lodged a police report on 20 August 2009. In that police report, the first appellant also claimed that the respondent was in arrears of rental.

[7] On 7 September 2009, both parties signed what is called a 'Deklarasi Bayaran Sewa Bulanan' ('Deklarasi'). Under this 'Deklarasi', the respondent undertook to pay all outstanding rentals and utility bills (electricity, water and telephone) and to have no outstanding bills. The 'Deklarasi' also prohibited the respondent from making any additional renovations to the said apartments and that the respondent was to demolish all renovations and restore the affected areas to their 'original state'.

[8] The appellants claimed that the respondent failed to attend to the agreed matters. As a result, the appellants' solicitors issued a notice of demand on 18 February 2010 requiring in essence, the respondent to put right the matters which had been agreed to earlier failing which the appellants would commence legal action.

[9] The respondent did not comply with the notice. So, the appellants lodged another police report on 26 April 2010.

[10] The parties met up to negotiate a settlement. Following discussion, the appellants instructed their solicitors to issue a letter dated 18 May 2010, captioned 'cadangan penyelesaian'. Alluding to their earlier discussion, the appellants retracted their legal notice of demand and advised that they will not proceed with court action on the following terms:

(a) the respondent settles all arrears of rental, air conditioning installments, electricity and water bills;

(b) the respondent agrees to vacate the said premises and to give vacant possession to the appellants;

(c) the appellants agree to pay part of the renovation costs for the said apartments based on value ascertained by their valuer;

(d) the respondent, at its own costs, to immediately demolish and restore to original state those renovations that the appellants have not agreed to;

(e) the appellants will not pay for the purchase of furniture while the respondent is to leave all original furniture belonging to the appellants in good order/state; and

(f) the respondent is to settle the personal debt of RM1,000 to the appellants.

[11] On 26 May 2010, the appellants' solicitors informed the respondent that the landlord was terminating the tenancy of the said apartments effective 1 June 2010. The appellants had been issued a notice to vacate the said apartments failing which the landlord would initiate distress proceedings.

Consequently, the respondent was required to vacate and surrender the keys to the said apartments before 1 June 2010 failing which the respondent would have to bear any loss suffered.

[12] The respondent did not vacate the said apartments.

[13] On 13 June 2010, the parties met again to attempt another settlement. This was followed by a letter of even date. The letter listed substantially the same terms of settlement as found in the earlier letter except that the outstanding arrears were now understandingly, more. The respondent was also to pay a sum of RM25,000 for the purchase of furniture. On their part, the appellants were required to change the hire-purchase agreements of the air conditioners with Courts Mammoth and the tenancy agreement to the respondent's name. The appellants would then withdraw their termination notice and refrain from proceeding with any litigation in court. The respondent was required to respond to this letter so that a written settlement agreement could be drawn up.

[14] By an undated letter found at p 437 of the record of appeal but which was received by the appellants on 19 July 2010, the respondent indicated that she was prepared to pay the arrears of rentals subject to the appellants' action on item 8 of the appellants' letter dated 13 June 2010. Item 8 pertains to the change of tenancy to the respondent's name. It would appear that as far as the respondent was concerned, she was not obliged to make any of the payments mentioned in the appellants' letter of 13 June 2010 unless and until the appellants sorted out the change of names for the tenancy agreement. The appellants on the other hand, were only prepared to attend to that change after the respondent had settled all arrears and payments.

[15] On 9 January 2011, the landlord informed the appellants that the rentals were in arrears to the sum of RM50,400 and that legal action would be taken if the arrears were not settled. These arrears were for rentals due from July to December 2010.

[16] By her solicitors' letter dated 8 February 2011, the respondent alleged that the appellants had agreed to affect the change of names in the tenancy agreement and threatened legal action if that was not affected within 14 days. Through their solicitors' letter dated 2 March 2011, the appellants denied the allegations. The appellants claimed that the respondent was only appointed as manager under the 'Perjanjian Persefahaman'. The appellants also claimed that the respondent had agreed under the 'Deklarasi' to make monthly payments to the appellants, pay all utility bills on time, not to make any alterations or extensions to the building or to any of the rooms of the said apartments, and that any alteration or extension done will be removed and the said apartments

restored to original state. Because the respondent had not kept her word, her appointment as manager was terminated and the 'Perjanjian Persefahaman' was revoked. The respondent was consequently required to vacate and return all keys to the said apartments. The appellants also demanded settlement of all arrears amounting to RM109,971.40.

[17] The respondent did not pay, neither did she vacate the said apartments.

[18] On 12 May 2011, the said apartments were repossessed by the landlord and a public auction was conducted under the distress proceedings in relation to items seized. The respondent sued the appellants seeking declaratory orders that the termination notices of 26 May 2010 and 2 March 2011 were invalid and unenforceable. She also sued for loss and damage relating to the distress proceedings and for loss of reputation. The claim was denied and the appellants counterclaimed for their own losses.

DECISION OF THE HIGH COURT

[19] After a full trial, the High Court allowed the respondent's claim with damages to be assessed by the deputy registrar (although the respondent's claim for economic loss and punitive damages were dismissed) while the appellants' counterclaim was dismissed.

[20] According to the learned High Court judge, the respondent was carrying on her business at the said apartments as usual until the appellants ordered her to leave and vacate the said apartments vide letters dated 18 February 2010 and 26 May 2010. After the respondent had protested through her letter dated 30 May 2010, the appellants had agreed that the respondent would replace the appellants as tenant after the respondent had settled all outstanding bills. Despite that agreement, the respondent continued to receive notices from the appellants on 5 January 2011 and 24 January 2011, followed by the notice of termination dated 2 March 2011 instructing the respondent to vacate the said apartments within 14 days. The said apartments were repossessed on 12 May 2011.

[21] The High Court found both notices to be invalid. The first notice dated 26 May 2011 which was a notice to vacate the said apartments was invalid because the respondent was not in breach of the 'Perjanjian Persefahaman' dated 9 July 2009. In His Lordship's view, there was no reason to terminate the agreement as the respondent was managing the said apartments well under the terms of the 'Perjanjian Persefahaman'. The appellants' allegation that the respondent had failed to settle the rentals and other utility bills was unreasonable as there was no clear provision in the 'Perjanjian Persefahaman' imposing such an obligation on the respondent. The High Court found that on

the contrary, the appellants were obliged to assist the respondent and as the original tenants of the said apartments, the appellants could not shift the burden of settling rentals etc to the respondent.

[22] The second notice of 2 March 2011 which was a termination of the respondent's appointment as manager and to vacate the said apartments, was also invalid and unenforceable. The court found the letter of 13 June 2010 imposing on the respondent the obligation to make various payments was in conflict with the 'Perjanjian Persefahaman'. Consequently, the respondent was not obliged to comply with the terms set out in the letter of 13 June 2010. In any case, the respondent had paid RM28,000 for the arrears of rental to the landlord so that she could replace the appellants as tenants. Despite that payment, the appellants failed to effect the replacement.

[23] The learned High Court judge found that the respondent had suffered loss and damage when the said apartments were seized. The respondent could not carry on with her business because her business equipment (*harta perniagaan*) had been auctioned off. The court ordered general damages and damages for loss of business equipment to be assessed by the deputy registrar.

THIS APPEAL

[24] As can be seen from the background facts, the arrangements between the parties started earlier than the 'Perjanjian Persefahaman'. It started under the MOU. However, the MOU was made between the two corporate entities of Maharani Apartment Hotel & Spa and Aman Mesra Apartment. The respondent and the first appellant respectively signed on behalf of those entities in that MOU. These two agreements must be considered together with the tenancy agreement, and the 'Deklarasi' as it sets the correct perspective and context of their relationship.

[25] The respondent is well aware of the tenancy agreement; that it is an agreement between the appellants and the landlord for a ten year tenancy of the said apartments. The respondent was appointed by the appellants, first of all through their respective companies, but later directly and personally by the appellants, but always as managers, to provide management and marketing services of the said apartments which the appellants wanted rented out on long term leases. The respondent's remuneration for this appointment was based on a percentage of the total profits collected from renting out the said apartments.

[26] When the said apartments were found to have been renovated without prior consent of the appellants but more important, without the approval of the local authorities, which fact was admitted by the respondent albeit argued to be 'minor and non-structural', the parties then signed a 'Deklarasi'. In this

'Deklarasi', the respondent agreed to pay all outstanding rentals and utility bills. The respondent further agreed that there would be 'no outstanding bills'. This can only mean that the respondent will pay all bills on time. At the same time, the respondent agreed to demolish all the renovations that had been unlawfully carried out and restore the affected areas to their 'original state'. The respondent further agreed that she will not carry out any additional renovations to the said apartments. There is no suggestion that this 'Deklarasi' is void for any vitiating reason.

[27] In view of the above, it becomes obvious that the learned High Court judge's decision on the appellants' letter dated 26 May 2010 is erroneous. Since the respondent is the manager of the said apartments which were tenanted to the appellants, not only was it right but it was necessary that the appellants notify the respondent of the termination of tenancy and requirement to deliver vacant possession of the said apartments back to the landlord by 1 June 2010. The validity of the landlord's notice to vacate has never been challenged. In fact, it is not in issue.

[28] The appellants' letter of 26 May 2010 was precisely for that purpose. The landlord had warned that if vacant possession was not handed over by 1 June 2010, legal action would be taken. The appellants passed that notification on to the respondent and rightly warned that if she failed to vacate by 1 June 2010, the respondent would have to bear any loss suffered. Such a letter issued under such circumstances and for such purpose is proper and lawful.

[29] This material aspect of the notice or letter of 26 May 2010 appears to have been overlooked by the learned High Court judge although His Lordship did observe at para 17 of his judgment that 'oleh kerana tuan tanah telah menamatkan perjanjian sewa dengan defendan-defendan, maka secara automatiknya 'Perjanjian Persefahaman' antara defendan-defendan dan plaintif juga berakhir'. Instead, His Lordship focused on the respondent's performance as manager of the said apartments: that she had carried out her duties well under the 'Perjanjian Persefahaman'; consequently, there was no reason to terminate the respondent's appointment as manager.

[30] With respect, the reasoning of the learned High Court judge in this respect is plainly wrong. Since the object of the letter of 26 May 2010 was to convey the landlord's notice of termination of tenancy and notice to vacate, we find that the letter of 26 May 2010 cannot be invalid or even improper. The declaratory order granted in relation to this letter is plainly erroneous and misplaced.

[31] As for the notice of termination dated 2 March 2011 which was declared to be invalid and of no effect, we also cannot agree with the decision of the High Court.

[32] The learned High Court judge had found that the appellants' letter of 13 June 2010 imposing on the respondent the obligation to make various payments was in conflict with the 'Perjanjian Persefahaman'. Consequently, the respondent was not obliged to comply with the terms set out in the letter of 13 June 2010. The learned High Court judge further found that the respondent had in any event paid RM28,000 for the arrears of rental to the landlord. Despite that payment, she had not replaced the appellants as tenants.

[33] With respect to the learned High Court judge, while the terms in this letter may appear to be in conflict with the 'Perjanjian Persefahaman', the court has clearly overlooked the other agreement which is to be found in the 'Deklarasi' of 7 September 2009. As was pointed out earlier, the relationship between the parties is to be found in the MOU, 'Perjanjian Persefahaman' and later, the 'Deklarasi'. All these agreements were freely entered into by the respondent; her signature is affixed to each of these agreements. These agreements must also be read together to discern the intention of the parties and the terms as agreed between them.

[34] Under the 'Perjanjian Persefahaman', the respondent was primarily appointed as manager of the said apartments. The respondent also agreed to pay the appellants 60% of the total profits under this arrangement. The respondent did not abide by the terms of this agreement. Instead, amongst others, the respondent wrongfully renovated the said apartments.

[35] In resolution of the state of affairs that the parties found themselves in at that time, the parties signed the 'Deklarasi' under which the respondent remained as the Manager of the said apartments. But this time, the respondent also agreed to pay all outstanding rentals and utility bills, demolish all renovations and restore the affected areas to their 'original state'; and not to carry out any additional renovations to the said apartments. Both the 'Perjanjian Persefahaman' and the 'Deklarasi' are agreements which were freely entered into by the respondent; her signature is affixed to each of these agreements. Both agreements must be read together to discern the intention of the parties and the terms as agreed between them. The agreements cannot be read in isolation and separate from each other.

[36] Once these agreements are properly understood, it becomes apparent that the terms of the respondent's appointment as manager no longer resides in the 'Perjanjian Persefahaman' alone or even the earlier MOU, but in the 'Deklarasi' as well. And, on a totality of evidence, both undisputed and

admitted, what is patently clear is that the respondent failed to attend to the matters that were agreed under both agreements, the 'Perjanjian Persefahaman' and the 'Deklarasi'.

[37] It was the respondent's own failure to keep up to her end of the obligations which ultimately led to the distress proceedings being brought by the landlord. Although the respondent's case was that the appellants were supposed to first arrange for the transfer of the tenancy agreement to the respondent's name; that is not supported by the terms of the 'Deklarasi' or by any of the correspondence exchanged between the parties at the material time.

[38] The appellants' letter of 13 June 2010 served as a reminder of the respondent's obligations as found in that 'Deklarasi', which obligations the respondent had not kept. Since the respondent did not comply with the appellants' letter of 13 June 2010, the arrears remained and built up again as was the case of the rentals which were unpaid for the months of July to December 2010. Consequently, the landlord issued the notice of 9 January 2011 which led to the distress proceedings and later, the auction.

[39] The respondent also did not contest the distress proceedings which in fact she could not possibly do so to start with since the respondent clearly had not paid the rentals. When rentals are not paid, the tenant, including one such as the respondent who had agreed to pay the rentals, must vacate the said apartments when the tenancy agreement is terminated. A writ of distress is lawfully and properly issued when a tenant fails to settle rentals and vacate premises. There is evidence aplenty of the appellants duly informing the respondent of the same in this case. Despite all these warnings, the respondent did not pay the rentals. The respondent certainly did not pay the rentals which eventually led to the distress proceedings by the landlord. Given that the respondent is really the architect of her own loss, the respondent's claim was unsustainable in law from inception.

[40] With respect, all this was overlooked by the learned High Court judge who instead had misdirected himself in finding for a recalcitrant respondent/plaintiff. The appellants were within their contractual right to terminate for breach with all those identified defaults on the respondent's part. The notice of termination is consequently valid and proper.

[41] In the circumstances, we find merit in the appellants' submissions. Consequently, we allow the appeal with costs of RM30,000 here and below. Deposit to be refunded to the appellants.

Appellants' appeal allowed with costs of RM30,000 here and below.

Reported by Dzulqarnain Ab Fatar